

10 Official Opinions of the Compliance Board 4 (2016)

- ◆ **5(C)(1) CLOSED SESSION PROCEDURES – WRITTEN STATEMENT, GENERALLY: AGENDA NOT A SUBSTITUTE UNLESS ACCURATE, COMPLETE, AND ADOPTED AT TIME OF CLOSING**
- ◆ **5(C)(3) CLOSED SESSION PROCEDURES – WRITTEN STATEMENT – OMITTING REASON FOR CLOSING, VIOLATION**
- ◆ **5(C)(2) CLOSED SESSION PROCEDURES – WRITTEN STATEMENT – PRESERVING CONFIDENTIALITY, PERMITTED**
- ◆ **6(D)(2) MINUTES- CLOSED SESSION SUMMARY – PRESERVING CONFIDENTIALITY, PERMITTED**

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March 8, 2016

Re: Washington Suburban Sanitary Commission
Peter Karpoff, *Complainant*

Complainant Peter Karpoff alleges that the Washington Suburban Sanitary Commission (“WSSC”) violated the Open Meetings Act by making inadequate disclosures concerning its July 15, 2015, September 16, 2015, and October 21, 2015 closed meetings. Specifically, Complainant alleges that WSSC did not create written closing statements before it closed its meetings, as required by § 3-305,¹ that WSSC did not specify why it needed to exclude the public, and that WSSC’s descriptions of the topics to be discussed were too vague. WSSC, by its counsel, disagrees.

We have discussed the applicable principles many times. We will refer the Complainant and WSSC to some of the pertinent prior opinions; they are also summarized in Chapter 5 of the Open Meetings Act Manual (November 2015).²

¹ Statutory references are to the General Provisions Article (2014, with 2015 supp.) of the Maryland Annotated Code, where the Act is codified.

² The Manual can be accessed through the open meetings page of the Attorney General’s website: <https://www.oag.state.md.us/Opengov/Openmeetings/index.htm>.

Background

For all three meetings, WSSC published an agenda that both listed a “closed meeting” item and described the anticipated discussion. The October 21, 2015 agenda, for instance, discloses this information about the anticipated closed session:

Closed pursuant to [Section] 3-305(b)(13) to approve the September 15, 2015 Closed Session Minutes; Section 3-305(b)(7) to consult with counsel to obtain legal advice on pending or potential litigation; and Section 3-305(b)(1) to discuss personnel matters relating to Commission Office Direct Reports and General Manager Search.

At each meeting, the presiding officer called for a motion, and a commissioner duly asserted one in substantially the same language as set forth in the agenda. The written minutes that WSSC adopted afterwards quote the motion and record the vote on it, but no contemporaneous written document evidences WSSC’s decision to close the meeting on the basis cited in the motion. However, WSSC did make a contemporaneous record of that decision: WSSC streams live video of its meetings, with an index that includes a heading for “closed meeting.” That heading leads to the video of the assertion of the motion and its adoption.

WSSC also made disclosures about the actual events of the closed sessions. Those disclosures appear in WSSC’s written minutes for each of the sessions it closed, and they include the time and location of the closed session, a listing of the persons present, the topics discussed, and the actions taken. For example, WSSC disclosed the following information about its October 21, 2015 closed session:

Commissioners were briefed on confidential legal matters affecting the Commission, including terms of the negotiated Consent Decree settlement agreement with PRK, CBF and MDE relating to the Potomac WFP reported out in Open Session. Counsel also discussed how negotiations were proceeding with the 2005 SSO Consent Decree extension. Commissioners took action to allow management to move forward in negotiations relating to the SSO Consent Decree extension (mover – Commissioner Boulware, seconder – Commissioner Bayonet, unanimous vote 6-0).

Discussion

The Act’s permission to close a session under § 3-305 is conditional: the public body must make disclosures about a closed session both before the closed session and after it. §§ 3-305 (d), 3-306(c)(2). At issue here is the adequacy of both sets of disclosures.

A. Written closing statements

Before a public body closes a meeting, the presiding officer must make a written statement, often called a “closing statement,” that specifies the statutory exception relied on for closing the meeting, the topics to be discussed, and the public body’s reason for excluding the public from the session. § 3-305(d)(2); *see also* 9 *OMCB Opinions* 28, 31-33 (2013) (summarizing the rules applicable to closed sessions and explaining how to apply them). The requirement is not met by disclosing the required information in the minutes of the session that was closed; minutes are not adopted and are not available until after the closed session. The Act places the responsibility for preparing the written closing statement with the presiding officer. § 3-305(d)(2); *see also, e.g.,* 9 *OMCB Opinions* 167, 168 (2014) (explaining the function of written closing statements and the presiding officer’s role in preparing them)

We find that although WSSC’s pre-closed-session disclosures were timely and substantially informative about the closed sessions, they fell slightly short of the Act’s requirements. In a nutshell: if WSSC’s presiding officer wants the agenda description of a proposed closed session to serve also as the written closing statement required by the Act,³ WSSC must take two additional steps. First, WSSC must include in the agenda description all three of the items of the information that the Act requires a public body to include in a written closing statement.⁴ Here, WSSC’s agenda descriptions for the closed sessions list the applicable statutory citations and the topics to be discussed, but they do not specify WSSC’s reasons for excluding the public from the particular discussions. For example, a public body might decide to receive legal advice from its lawyer in a closed session because the public body does not want to waive the attorney-client privilege as to a particular matter, or because public disclosure would adversely affect the public body’s position in litigation, or even because the public body wants the lawyer’s advice on whether a matter should or must be kept confidential. If so, the public body should disclose those reasons; it is not necessarily a foregone conclusion that a public body’s attorney should only address the members’ questions in a closed session. WSSC did not disclose, for any of the closed sessions, why it chose to exercise its discretion to exclude the public. By omitting that information, it violated § 3-305(d)(2).

Second, WSSC’s presiding officer must acknowledge the agenda description as his or her written closing statement. Before doing so, however,

³ For an explanation of the written statement that a presiding officer must prepare before a public body closes an open meeting, *see* 9 *OMCB Opinions* 28, 31-33 (2013), where we summarized the rules applicable to closed sessions and explained how to apply them.

⁴ For an explanation of this requirement and the purposes served by the written disclosure of each separate item of information, *see* 9 *OMCB Opinions* 15, 22-24 (2013).

the presiding officer must decide that the agenda description accurately conveys the required information at the time of closing, particularly as to the commissioners' reasons for excluding the public. By definition, agendas are prepared before meetings, usually by staff, and they merely project that the members of the public body might vote to exclude the public from part of the meeting. By contrast, closing statements are to inform the public, at the time of the closing, why the members themselves are choosing to close the meeting. We therefore think it a better practice to prepare a separate written closing statement at the time of the vote. *See* 8 *OMCB Opinions* 166, 168-69 (2013) (explaining the advantages of using the model closing statement posted on the Attorney General's website); 9 *OMCB Opinions* 167 (explaining that the presiding officer's preparation of the closing statement "ensures that the presiding officer is aware of the confines within which the officer must keep the [closed-session] discussion."). In any event, the Act requires the presiding officer to prepare, or at least acknowledge, a written closing statement to evidence the members' basis for closing the meeting.

Complainant also alleges that WSSC's agenda descriptions, even if seen as closing statements, did not adequately disclose the topics to be discussed. Specifically, he complains that the references to sessions closed "to consult with counsel to obtain legal advice on pending or potential litigation" and similarly general references to legal advice did nothing more than repeat the statutory language. Ordinarily, we have explained, it is indeed insufficient to use only the words of the statutory exception to describe the topics to be discussed. *See, e.g.,* 9 *OMCB Opinions* 46, 50 (2013) (illustrating the principle). We have also explained, however, that the "level of detail in the written statement required prior to a closed session and in the minutes of the ensuing open session may preserve the confidence of information that led to the session's being closed in the first place." 1 *OMCB Opinions* 16, 17 (1992). For that reason, "a session closed for a discussion of litigation need not disclose information encompassed by the attorney-client privilege." *Id.* Generally, the attorney-client privilege extends to "all communications that pass in confidence between the client and his attorney during the course of professional employment or as an incident of professional intercourse between them." *Blanks v. State*, 406 Md. 526, 538-39 (2008) (citation and internal quotation marks omitted). We find that WSSC did not violate the Act with regard to the disclosure of the topics that it intended to discuss with its lawyer.

In sum, WSSC made some disclosures before it closed the three meetings in question, but it did not make all of the disclosures, and did not take all of the steps, required by § 3-305(d), and it thereby violated that provision.

B. Closed-session summaries

After the closed session and in the minutes of its next open session, the public body must report on four categories of information about what actually occurred. § 3-306(c)(2). Among other things, the public body must "list[] the topics of discussion, persons present, and each action taken during

the closed session.” As to these disclosures, also, Complainant alleges that WSSC failed to particularize all of the topics that WSSC discussed with its lawyer. Instead, Complainant states, WSSC chose only to particularize some topics. Regarding its September 16 closed session, for example, WSSC disclosed: “Commissioners were briefed on confidential legal matters affecting the Commission, including terms of the negotiated draft Consent Decree agreement that was discussed in Open Session.”

We reach the same conclusion we reached above: WSSC did not violate the Act with regard to the disclosure of topics that it intended to discuss with its lawyer.

Conclusion

We have found that WSSC violated § 3-305(d)(2) of the Act by not creating a written closing statement before it closed these three meetings and by not articulating the reasons for excluding the public from each. Still, this is not a case in which a public body failed to create any record of the basis for the closed sessions and the topics to be discussed; WSSC creates a video record of its meetings, and the motion, albeit deficient in one regard, can be seen on the video.

We have also found that WSSC did not violate the Act with regard to its descriptions of topics within the attorney-client privilege.

Open Meetings Compliance Board

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